

**Little Rock Electrical Contractors, Inc. and Local Union 238 of the International Brotherhood of Electrical Workers, AFL-CIO.** Case 11-CA-17399

September 28, 2001

**SUPPLEMENTAL DECISION AND ORDER  
BY MEMBERS LIEBMAN, TRUESDALE, AND  
WALSH**

On October 16, 1998, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief. On June 7, 2000, the National Labor Relations Board issued an Order remanding the proceeding to the judge for further consideration in light of *FES*, 331 NLRB 9 (2000).

On July 26, 2000, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified<sup>2</sup> and set forth in full below.

1. We do not agree with our dissenting colleague that the record should be remanded again to allow the Respondent to litigate whether the individuals the Respondent hired were more qualified than the discriminatees.

Our June 7, 2000 remand of this proceeding in light of *FES*, supra, instructed the judge to reopen the record *if necessary*. Pursuant to our remand, the judge invited the Parties to address the available openings and job qualifications issues, "including whether the record is sufficient to decide the issues." The Respondent's brief responding to the judge's invitation did not request that the record be reopened to litigate whether the employees hired were

more qualified than the discriminatees, nor does the Respondent claim that the individuals it hired (excepting 20 Native Americans) were more qualified than the discriminatees. We thus cannot agree that *FES* requires a hearing on an issue that the Respondent has not raised at any time subsequent to the issuance of *FES*.

2. The parties stipulated that the Respondent, according to its contract with the Tribal Counsel Gaming Enterprises, would give a hiring preference to Native Americans. The General Counsel conceded in his brief to the judge after the hearing that the Respondent was required to give preference to Native American applicants. Further, no party has questioned the legality of the hiring preference.

The Respondent hired 20 Native Americans. The General Counsel's concession that the Respondent was required to give preference to Native Americans precludes us from finding that the 20 positions into which Native Americans were hired were available openings under *FES*.

In all, the Respondent hired 73 employees. Excluding the 20 positions into which Native Americans were hired, there were 53 available positions. We held in *FES*, supra at 9:

Where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings.

We shall leave to compliance the determination of which discriminatees would have been hired for the 53 available openings.<sup>3</sup>

Under the circumstances set forth above, we do not believe the judge abused his discretion when he decided that the record did not need to be reopened.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Little Rock Electrical Contractors, Inc., Little Rock, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Advising employees that the Respondent changed its hiring policy in order to avoid accepting employment applications and/or hiring employees associated with the Union.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Because we agree with the judge that the Respondent's reasons for not hiring the discriminatees were pretextual, it is unnecessary to pass on his alternative finding that the Respondent's hiring procedure was inherently destructive of employee rights.

<sup>2</sup> We shall conform the judge's recommended Order and notice with his findings. We shall also modify the recommended Order to provide the customary remedial language. Finally, we will modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

<sup>3</sup> The judge found that one of the discriminatees, Jamie Brown, is an enrolled Cherokee Indian. In light of the hiring preference described above, this fact should be taken into account during the compliance proceeding.

(b) Promulgating and maintaining a rule prohibiting employees from discussing the Union while permitting the discussion of other nonwork related topics during working time.

(c) Advising employees that it is futile to support the Union.

(d) Interrogating applicants for employment concerning their union activities.

(e) Refusing to consider for hire or hire applicants for employment because of their union affiliation or perceived union affiliation.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Billy Atkinson, William Blanken III, Jamie Brown, Julian Buchanon, Dewey Buckner, William Carmichael, Kenneth Clodfelter, Allen Craver, Henry Crowell, Gregory Davis, Charlie Dennis, Joshua Donly, Frank Ellis, James Epps Jr., James Faulkner, Charles Garman, Laval Hammet, Douglas Hasty, Grant Hill, Howard Hill Jr., Randy Hinson, Marcus Jamison, Eddie Kee, Bob Krebs, Perry Ledbetter, Jerry Loftis, John Luther, John Malan, John Maricle, Gary Maurice, David Mazzie, Steve McAuley, Patrick McCarthy, Mike Miller, Edmond Pearsall, Charles Phillips, Ronnie Reece, Erickson Reynolds, Lawrence Reynolds, Joshua Rhodes, Paul J. Rhodes, Clarence Russell, Allan Samuels, Robert E. Simmons, Richard Sluder, Ralph Steadwick Jr., David Steiner, Matthew Steiner, James Tolley, Danny Vella, Anthony Verounce, Robert Waters, Richard Watt, C. D. Willocks, Dale Willocks, Robert Willocks Jr., and Steve Wood instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(b) Make Billy Atkinson, William Blanken III, Jamie Brown, Julian Buchanon, Dewey Buckner, William Carmichael, Kenneth Clodfelter, Allen Craver, Henry Crowell, Gregory Davis, Charlie Dennis, Joshua Donly, Frank Ellis, James Epps Jr., James Faulkner, Charles Garman, Laval Hammet, Douglas Hasty, Grant Hill, Howard Hill Jr., Randy Hinson, Marcus Jamison, Eddie Kee, Bob Krebs, Perry Ledbetter, Jerry Loftis, John Luther, John Malan, John Maricle, Gary Maurice, David Mazzie, Steve McAuley, Patrick McCarthy, Mike Miller, Edmond Pearsall, Charles Phillips, Ronnie Reece, Erickson Reynolds, Lawrence Reynolds, Joshua Rhodes, Paul J. Rhodes, Clarence Russell, Allan Samuels, Robert E. Simmons, Richard Sluder, Ralph Steadwick Jr., David

Steiner, Matthew Steiner, James Tolley, Danny Vella, Anthony Verounce, Robert Waters, Richard Watt, C. D. Willocks, Dale Willocks, Robert Willocks Jr., and Steve Wood whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Billy Atkinson, William Blanken III, Jamie Brown, Julian Buchanon, Dewey Buckner, William Carmichael, Kenneth Clodfelter, Allen Craver, Henry Crowell, Gregory Davis, Charlie Dennis, Joshua Donly, Frank Ellis, James Epps Jr., James Faulkner, Charles Garman, Laval Hammet, Douglas Hasty, Grant Hill, Howard Hill Jr., Randy Hinson, Marcus Jamison, Eddie Kee, Bob Krebs, Perry Ledbetter, Jerry Loftis, John Luther, John Malan, John Maricle, Gary Maurice, David Mazzie, Steve McAuley, Patrick McCarthy, Mike Miller, Edmond Pearsall, Charles Phillips, Ronnie Reece, Erickson Reynolds, Lawrence Reynolds, Joshua Rhodes, Paul J. Rhodes, Clarence Russell, Allan Samuels, Robert E. Simmons, Richard Sluder, Ralph Steadwick Jr., David Steiner, Matthew Steiner, James Tolley, Danny Vella, Anthony Verounce, Robert Waters, Richard Watt, C. D. Willocks, Dale Willocks, Robert Willocks Jr., and Steve Wood and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Little Rock, Arkansas, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Since work has been completed on the jobsite in Cherokee, North Carolina, involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Cherokee jobsite at any time since the commencement of the unfair labor practices in January 1997, and to all the discriminates named herein.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER TRUESDALE, dissenting in part.

I agree with the judge and my colleagues that the General Counsel has established a *prima facie* case under the framework set out in *FES*<sup>1</sup> that the Respondent violated Section 8(a)(3) and (1) by refusing to hire union applicants to perform electrical work at a casino construction project in Cherokee, North Carolina. But unlike my colleagues, I am not satisfied that the Respondent has been provided a sufficient opportunity under *FES* to establish a defense to the *prima facie* case and, therefore, I would remand this proceeding a second time to allow the Respondent to do so.

Under *FES*, once the General Counsel has established his case, “the burden will shift to the respondent to show that it would not have hired the [union] applicants even in the absence of their union activity or affiliation.” *FES*, supra at 12. One of the ways in which a respondent can meet this burden is to show that the employees who were hired “had superior qualifications, and that it would not have hired [the union applicants] for that reason even in the absence of their union support or activity.” *Id.* A hearing on the merits is the preferred, if not the required, procedure for establishing this defense. *Id.*

The judge, however, concluded that a reopened hearing was not necessary in this case because, based on the record evidence already in existence from the initial *pre-FES* hearing, he was able to determine the merit of the Respondent’s defense simply by comparing the applications of the union applicants with the applications of those who were hired. Having found that the “applications of the applicants hired do not reflect that they were any more qualified than the union applicants,” the judge determined that there was no established defense to the 8(a)(3) allegations and, therefore, he reaffirmed his original decision which found the violations as alleged.

<sup>1</sup> *FES*, 331 NLRB 9 (2000).

I cannot agree that the Respondent’s defense can be disposed of on this basis alone. Comparing applications is certainly *an* appropriate method for resolving the relative qualifications of competing union and nonunion applicants for employment, but there may be other factors outside the four corners of the written application that may be relevant to the issue. Whether the Respondent possesses such evidence and whether it is sufficient to sustain its defense under *FES* are two questions that should have been resolved following a hearing.

Closely related to these questions is a third question which involves the 20 Native Americans whom the Respondent did not hire. In both his original and supplemental decisions, the judge, based on a stipulation by the parties, recognized that as “local Indian workers” they were hired by the Respondent pursuant to a valid preference arrangement between the general contractor and the Cherokee Indian tribe on whose property the casino was to be built. If that is so, and if some of the union applicants were denied employment because this hiring policy lawfully favored the Native Americans, then there may be fewer than 57 job openings for the 57 union applicants, even without regard to the qualifications of the other non-Native Americans who were hired instead of the union applicants.

Until the foregoing questions are resolved by the judge following a hearing, I find it premature to pass on the complaint allegations. Consistent with *Kaminski Electric*<sup>2</sup> and *Watkins Engineers*,<sup>3</sup> the Respondent should be allowed to present evidence at a hearing, as set forth above, that those whom it hired for its casino project, including the 20 Native Americans, was the result of lawful consideration of valid criteria, and that for this reason it would not have hired the union applicants despite its animus against their union affiliation.<sup>4</sup> The issue should thereafter be resolved consistent with *FES*.

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

<sup>2</sup> *Kaminski Electric & Service Co.*, 332 NLRB 452 (2000).

<sup>3</sup> *Watkins Engineers & Constructors, Inc.*, 333 NLRB 818 (2001).

<sup>4</sup> Cf. *FES*, 333 NLRB 66 (2001), where the judge, on remand from the Board, determined the job availability question that I would require here, but did so without a reopened hearing only because “[s]tipulations by the parties obviated the need for a further hearing.”

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT advise employees that we changed our hiring policy in order to avoid accepting employment applications and/or hiring employees associated with Local Union 238 of the International Brotherhood of Electrical Workers, AFL-CIO.

WE WILL NOT promulgate and maintain a rule prohibiting employees from discussing the Union while permitting the discussion of other nonwork related topics during working time.

WE WILL NOT advise our employees that it is futile to support the Union.

WE WILL NOT interrogate applicants for employment concerning their union activities.

WE WILL NOT refuse to consider for hire or hire applicants for employment because of their union affiliation or perceived union affiliation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Billy Atkinson, William Blanken III, Jamie Brown, Julian Buchanon, Dewey Buckner, William Carmichael, Kenneth Clodfelter, Allen Craver, Henry Crowell, Gregory Davis, Charlie Dennis, Joshua Donly, Frank Ellis, James Epps Jr., James Faulkner, Charles Garman, Laval Hammet, Douglas Hasty, Grant Hill, Howard Hill Jr., Randy Hinson, Marcus Jamison, Eddie Kee, Bob Krebs, Perry Ledbetter, Jerry Loftis, John Luther, John Malan, John Maricle, Gary Maurice, David Mazzie, Steve McAuley, Patrick McCarthy, Mike Miller, Edmond Pearsall, Charles Phillips, Ronnie Reece, Erickson Reynolds, Lawrence Reynolds, Joshua Rhodes, Paul J. Rhodes, Clarence Russell, Allan Samuels, Robert E. Simmons, Richard Sluder, Ralph Steadwick Jr., David Steiner, Matthew Steiner, James Tolley, Danny Vella, Anthony Verounce, Robert Waters, Richard Watt, C. D. Willocks, Dale Willocks, Robert Willocks Jr., and Steve Wood instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions.

WE WILL make Billy Atkinson, William Blanken III, Jamie Brown, Julian Buchanon, Dewey Buckner, William Carmichael, Kenneth Clodfelter, Allen Craver, Henry Crowell, Gregory Davis, Charlie Dennis, Joshua Donly, Frank Ellis, James Epps Jr., James Faulkner,

Charles Garman, Laval Hammet, Douglas Hasty, Grant Hill, Howard Hill Jr., Randy Hinson, Marcus Jamison, Eddie Kee, Bob Krebs, Perry Ledbetter, Jerry Loftis, John Luther, John Malan, John Maricle, Gary Maurice, David Mazzie, Steve McAuley, Patrick McCarthy, Mike Miller, Edmond Pearsall, Charles Phillips, Ronnie Reece, Erickson Reynolds, Lawrence Reynolds, Joshua Rhodes, Paul J. Rhodes, Clarence Russell, Allan Samuels, Robert E. Simmons, Richard Sluder, Ralph Steadwick Jr., David Steiner, Matthew Steiner, James Tolley, Danny Vella, Anthony Verounce, Robert Waters, Richard Watt, C. D. Willocks, Dale Willocks, Robert Willocks Jr., and Steve Wood whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Billy Atkinson, William Blanken III, Jamie Brown, Julian Buchanon, Dewey Buckner, William Carmichael, Kenneth Clodfelter, Allen Craver, Henry Crowell, Gregory Davis, Charlie Dennis, Joshua Donly, Frank Ellis, James Epps Jr., James Faulkner, Charles Garman, Laval Hammet, Douglas Hasty, Grant Hill, Howard Hill Jr., Randy Hinson, Marcus Jamison, Eddie Kee, Bob Krebs, Perry Ledbetter, Jerry Loftis, John Luther, John Malan, John Maricle, Gary Maurice, David Mazzie, Steve McAuley, Patrick McCarthy, Mike Miller, Edmond Pearsall, Charles Phillips, Ronnie Reece, Erickson Reynolds, Lawrence Reynolds, Joshua Rhodes, Paul J. Rhodes, Clarence Russell, Allan Samuels, Robert E. Simmons, Richard Sluder, Ralph Steadwick Jr., David Steiner, Matthew Steiner, James Tolley, Danny Vella, Anthony Verounce, Robert Waters, Richard Watt, C. D. Willocks, Dale Willocks, Robert Willocks Jr., and Steve Wood and, WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire will not be used against them in any way.

#### LITTLE ROCK ELECTRICAL CONTRACTORS, INC.

*Rosetta B. Lane, Esq. and Lisa R. Shearin, Esq., for the General Counsel.*

*Judd H. Lees, Esq. and Charles F. Mills, Esq., for the Respondent.*

#### DECISION

#### STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on January 26, 27, and 28, 1998, in Winston-Salem, North Carolina, pursuant to a complaint filed by the Regional Director for Region 11 of the National Labor Relations Board (the Board) on July 23, 1997. The complaint,

as amended at the hearing, is based on a second amended charge filed by Local Union 238 of the International Brotherhood of Electrical Workers, AFL-CIO (the Charging Party or the Union) and alleges that Respondent Little Rock Electric Contractors, Inc. (the Respondent or Little Rock) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The complaint is joined by the answer filed by Respondent as amended at the hearing wherein Respondent denies the commission of any violations of the Act.

On the entire record in this proceeding, including my observations of the witnesses who testified herein and after due consideration of the parties' positions at the hearing and their briefs, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

#### A. The Business of Respondent

The complaint alleges, Respondent admits, and I find that Respondent was and has been at all times material, an Arkansas corporation, with a jobsite located at Cherokee, North Carolina, where it was engaged in electrical construction, that during the past 12 months, a representative period, Respondent purchased and received at its Cherokee, North Carolina jobsite goods and materials valued in excess of \$50,000 directly from points outside the State of North Carolina and that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

#### B. The Labor Organization

The complaint alleges, Respondent admits, and I find that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES<sup>1</sup>

#### A. Background

Respondent operates as a nonunion general electrical contractor. This case involves the hiring and employment practices engaged in by Respondent in late 1996 and early 1997, in response to efforts of the Union to have its members seek employment in order to "salt" its work force with union members in an attempt to organize Respondent's employees. Salting is a practice utilized by the International Brotherhood of Electrical Workers (the International) and its local unions wherein its members apply for work at nonunion employers engaged in the construction and electrical contracting industry in order to organize their employees. In *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), the United States Supreme Court upheld the Board's position that paid union organizers are employees within the meaning of Section 2(3) of the Act. The Court held that the language of the Act "is broad enough to include those company workers whom a union also pays for organizing" and "board's broad literal interpretation of the word 'employee' is consistent with several of the Act's purposes, such as protecting the rights of employees to organize for mutual aid without em-

ployer interference," citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945), and "encouraging and protecting the collective-bargaining process," citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984). In *Town & Country*, the Court rejected arguments that salts "might try to harm the company perhaps quitting when the company needs them, perhaps disparaging the company to others, perhaps even sabotaging the company or its products." The Court noted that the Union's salting resolution in that case contained "nothing that suggests, requires, encourages or condones impermissible or unlawful activity." The Court also noted that, "[i]f a paid union organizer might quit, leaving a company employer in the lurch, so too might an unpaid organizer, or a worker who has found a better job, or one whose family wants to move elsewhere. And if an overly zealous worker might hurt the company through unlawful acts, so might an unpaid zealot (who may know less about the law) or a dissatisfied worker (who may lack an outlet for his grievances). This does not mean that they are not 'employees'." The Court further noted that the law offers alternative remedies for those concerns, such as "fixed term contracts, rather than hiring them 'at will'" or "negotiating with its workers for a notice period," and that "a company faced with unlawful (or possibly unlawful) activity can discipline or dismiss the worker, file a complaint with the Board, or notify law enforcement authorities." The foregoing settled the issue whether employees who are paid union organizers or who intend to act as "salts" are "employees" under the Act. Clearly they are employees entitled to the protections of the Act.

#### B. Facts

George Smith is Respondent's president. Willie Godwin is the vice president and general superintendent. Bobby Howell was the project manager/superintendent for the Harrah's Casino project located at Cherokee, North Carolina.<sup>2</sup> Harrah's N.C. Casino Company, L.L.C. (Harrah's) entered into a contract with the Tribal Counsel Gaming Enterprises (TCGE) of the Eastern Band of Cherokee Indians in Cherokee, North Carolina, to construct, develop, staff, and operate a casino on the property of the Eastern Band of Cherokee Indians in Cherokee, North Carolina. Harrah's was involved in the selection of Rentenbach Constructors Incorporated (Rentenbach) as the general contractor to construct the casino. Rentenbach entered into a contract with the TCGE to construct the casino. Respondent was chosen by Rentenbach to serve as the major electrical subcontractor for the casino project. It was stipulated at the hearing that in accordance with the contract between Rentenbach and the TCGE, that Native American Indians were to be given a hiring preference. Exhibit L of the contract provides that Rentenbach will "identify opportunities for local Indian workers to become employees of various contractors." In early November 1996, Paul J. Rhodes, business manager of Local 238, learned that Respondent would have the contract to provide the electrical construction for the project. He informed Gary Maurice, then organizing coordinator for the International Union. Maurice tele-

<sup>1</sup> The following includes a composite of the credited testimony at the hearing.

<sup>2</sup> I find that Smith, Godwin, and Howell were at all times material supervisors and agents of Respondent within the meaning of Sec. 2(11) of the Act.

phoned and spoke to Respondent's vice president, Godwin, and later to its president, Smith, concerning performing the job with the Union. On November 11, 1996, Business Manager Rhodes telephoned Smith at Respondent's home office in Little Rock, Arkansas, concerning doing the job with the Union and Smith told him he had not decided whether to do the job "union" or not. On that same date, Rhodes sent two union members (Jaime Brown, an enrolled Cherokee Indian, and Steven Wood) to the Cherokee jobsite. They gave a list of union electricians available for work to Mike Lotzer, a representative of Harrah's who was at the only trailer, then on the jobsite. This list was also mailed to Smith by Rhodes and included the name of James Tolley. Rhodes also sent a wage package reflecting Local Union 238's wage rates to Smith on November 13, 1996. Although Respondent and Rentenbach did not sign a formal contract until July 1997, Rentenbach advised Respondent of its selection as the electrical contractor in November 1996, and Respondent brought its job trailer onto the jobsite and commenced hiring and working in January 1997. Rentenbach's regional marketing manager, Tim Tidwell, testified that this is common in the construction industry where projects are often commenced and concluded prior to the parties entering into a signed agreement.

A job fair was held on December 7, 1996, by Rentenbach in a gymnasium on the Cherokee reservation and separate tables were set up for each of the subcontractors who Rentenbach anticipated would perform the work in order to obtain an assessment of manpower available to the various contractors. The job fair was originally set up by Rentenbach representatives and the chosen contractors were to have two representatives available to conduct "mini interviews" with potential job applicants among Native Americans who were to receive a preference for hiring pursuant to the contract between TCGE and Rentenbach. However, the job fair was made open to the public and advertised in a local newspaper and on local television. Rentenbach Representative Reba Peach faxed a copy of a notice of the job fair to Business Manager Rhodes. The notice stated, "This is to inform you of the job fair to be held Saturday, December 7 at the Charles George Gymnasium—9:00 a.m. until 6:00 p.m. to be interviewed for construction opportunities for the Harrah's Casino at Cherokee, N.C., Please plan to attend." Rhodes contacted two other local IBEW unions, Locals 342 and 379, and their representatives and a number of their members met at the Local 238 union hall in Asheville, North Carolina, and proceeded to the job fair together. These employees wore union insignia of some kind (hats, shirts, and buttons) identifying themselves as union members and/or indicated their union affiliation on their applications. Included among this group were Jamie Brown, Steve Wood, Paul J. Rhodes, Robert E. Simmons, Joshua Rhodes, Ronnie Reece, Danny Vella, Gary M. Maurice, Laval Hammett, Perry Ledbetter, Steve McAuley, Julian Buchanon, Ralph Steadwick Jr., Dewey Buckner, Kenneth Clodfelter, Anthony Verounce, Allan Samuels, Billy Atkinson, Dale Willocks, Allen Craver, James Epps Jr., Jerry Loftis, Charlie Dennis, David Mazzie, Randy Hinson, Matthew Steiner, David Steiner, Patrick McCarthy, John Maricle, James Faulkner, William Carmichael, Henry Crowell, Mike Miller, C. D. Willocks, Douglas Hasty,

and Joshua Donly. When they arrived at the gymnasium used for the job fair they were met at the door by Rentenbach representatives who gave them each an application form prepared by Rentenbach and directed them to separate tables staffed by the various contractors' representatives including a table for Respondent Little Rock staffed by Vice President Godwin and Project Manager Howell, who reviewed their applications, talked to them concerning the job and their qualifications and then made notations on their applications and signed them indicating that they had interviewed the applicants. The applications were then collected by Rentenbach representatives and were subsequently retained by Rentenbach at its trailer on the jobsite for use by the contractors on request. The Little Rock representatives, Godwin and Powell, did not offer any of its own job applications to any of the applicants and none had been taken to the job fair. None of the applicants were informed that Little Rock would not utilize the applications in the hiring process or that they needed to fill out a Little Rock application to be considered for employment by Little Rock. Neither were the applicants given a copy of Little Rock's hiring policies. As the members were leaving the job fair, Rentenbach Representative Reba Peach gave Business Manager Rhodes a number of blank applications and told him to have any additional members who were interested in employment fill out the applications and send them back. Rhodes gave some of the blank applications to Local Unions 342 and 379 representatives for their members and several of their members returned them to their representatives who forwarded them to Rhodes. On January 16, 1997, Rhodes mailed the applications and some additional ones from members of Local 238 to Respondent at its Little Rock office. The applications were filled out by Lawrence Reynolds, Frank Ellis, Robert Waters, Edmond Pearsall, Richard Sluder, John Luther, Robert Willocks Jr., Erickson Reynolds, Grant Hill, Bob Krebs, Richard Watt, William Blanken III, Clarence Russell, Eddie Kee, Charles Garman, Howard Hill Jr., Gregory Davis, Marcus Jamison, John Malan, Charles Phillips, and James Tolley. Respondent's president, Smith, responded to Rhodes' letter by his letter of January 27, 1997, advising that Respondent was "not accepting applications at this time" and enclosed a copy of Little Rock's hiring policies as follows:

We hire applicants solely based upon merit. We do not discriminate on the basis of Union affiliation, race, sex, color, age, national origin, disability or any other protected status.

No employee is required to pay dues to any labor organization to join Little Rock Electrical Contractors, Inc.

We accept job applications only when we know there are jobs available and when we intend to fill the position(s) from persons not currently employed by Little Rock Electrical Contractors, Inc. when openings become available. We reserve the right to review active applications on file, prior to hiring. Applications remain active for fifteen (15) days. It is the Applicant's responsibility to keep our hiring personnel informed on his/her availability.

We do not accept group applications or photocopied forms. We hire based on personal contact with individu-

als so that we can make sound business judgements as to the most qualified applicants.

Any applicant who falsifies or omits information on the application is disqualified from being hired. If the applicant has been hired before the falsification or omission is discovered, he or she is subject to termination.

We base our hiring decisions on a variety of factors, including skills and ability to perform the job, prior employment with Little Rock Electrical contractors, Inc., employment references as to character and willingness to work, willingness to accept the offered salary, and personal interviews.

*Full-time employees are expected to work only for Little Rock Electrical Contractors, Inc. and must state that they will not be employed by any other employer while they work for Little Rock Electrical Contractors, Inc.* [Emphasis added.]

The union applicants at the job fair did not testify that Howell or Godwin had told them they were hiring immediately and several of them testified that they were told by Little Rock and Rentenbach representatives that the job fair was being held to determine the availability of Native Americans. However, Rhodes and several of the union applicants testified they were told by Godwin or Howell that the Rentenbach forms were valid applications for employment and would be valid for the entire project. Howell and Godwin denied this. I credit Rhodes and the applicants. Respondent Little Rock, in its brief, contends that "any misunderstanding regarding the purpose of the job fair was clarified by the afternoon of the December 7 Job Fair. At that time, International Organizer Maurice was advised by Godwin in no uncertain terms that the only reason LRE (Respondent) was at the job fair was as a courtesy to the Cherokee Nation." Respondent further contends in its brief that at the conclusion of the job fair "it retained no Rentenbach forms. While those forms were later available at the Harrah's Casino project, they were not utilized in any manner by LRE with the exception of Rentenbach forms indicating Native American status." In support of its position Little Rock also relies on a summary letter it received from Rentenbach Representative Tim Tidwell after the job fair which indicated there were 177 employee applications including 80 submitted by enrolled members of the Eastern Band of the Cherokee Nation. The letter also noted there were 25 IBEW applicants. Respondent argues in its brief that Tidwell "again stressed the absence of immediate hiring expectations at the job fair when he stated":

Generally speaking, we were pleased with the skill level of the applicants and the trade contractors verbally indicated that they identified applicants who they will be contacting for further review and possibly for hire.

Project Manager Howell came to Cherokee, North Carolina, to commence the casino project on December 26, 1996, following his earlier visit at the job fair on December 6, 1996. When he arrived, Rentenbach and Harrah's already had job trailers at the site. In January 1997, Respondent's job trailer was placed at the site. Howell began hiring employees at the jobsite in January 1997. In doing so he used the applications taken by

Respondent at the job fair for the purpose of hiring Native Americans only and disregarded all other applications taken at the job fair, notably those filled out by the union members. Howell testified he initially took applications freely usually on Saturdays, but after a short while (a week or two) he became so inundated with applicants that he put up a "not hiring" sign which he covered up only when he was hiring which could occur at any time and day without affording advance notice to possible applicants. None of the union members who applied at the job fair or whose applications were mailed to the Respondent were notified of the need to file a Little Rock application in order to be considered for hire. Moreover union members who came to the jobsite to check on their applications were told their applications were on file at the Rentenbach trailer, but were not told that these applications were not being considered by Respondent. Rather, on at least three occasions Respondent's secretary, Tina Earwood, told union applicants that Respondent used the applications as they needed them by having Rentenbach send them to Respondent's trailer. Howell admitted at the hearing that the job fair applications were used solely to hire Native Americans.

Respondent's witnesses testified that at the request of General Contractor Rentenbach they participated in the job fair which was solely intended to afford employment opportunities for Native Americans and that they never intended to utilize the job applications prepared by Rentenbach as a hiring source except for the hiring of Native Americans. However, Rentenbach Regional Marketing Manager Tidwell, whom I credit, testified that the job fair, which was advertised in the local area newspapers, was in fact open to the public in order to obtain workers for the gambling casino project. Although Respondent's witnesses participated in this process they contended that it was meaningless and that they only considered applicants who filled out Respondent's form applications, which they admittedly did not bring to the job fair.

Subsequently on the jobsite, Respondent maintained a "not hiring" sign on its job trailer office and routinely turned away all applicants who wore union logos or insignia, contending that it only hired employees when the sign was down which occurred at various times on an hourly basis and Respondent's project manager, Howell, testified that potential applicants must check daily and even hourly. He refused to inform union applicants when he would be hiring in order that they could apply. They were never afforded Little Rock applications as he contended he only took applications when he was hiring which information was kept from them. Applicants who came to the Respondent's trailer office inquiring about their applications presented at the job fair were told to go to the Rentenbach (the general contractor's) trailer to see if Rentenbach had them on file. During this period, Respondent managed to hire 73 employees which did not include a single known union applicant who had filled out applications at the job fair. Only 20 of the 73 employees hired were Native American Indians. The union applicants were disregarded and were denied the opportunity to apply.

In January 1997, Jim Ross called Respondent at its office in Arkansas regarding employment. He did not reveal any union affiliation. He left his name and telephone number as he was

told Respondent was not then currently hiring but would contact him when hiring commenced. Howell called Ross and interviewed him on Saturday, January 25, 1997, at the job trailer. The "not taking applications" sign was covered with a blank piece of paper. Jim Ross testified that during this interview, Howell asked if he had ever been sworn in as a member of the Union which he answered in the negative. Ross went on during the interview to tell Howell of his father's loss of his business as a union contractor allegedly resulting from slow work by union members. Although Ross was not a union member at the time, he had sought out Union Business Manager Rhodes and offered to help the Union in organizing in the area and was seeking to join the Union. Ross was hired and started on February 3, 1997.

Richard Oxford went to the Respondent's job trailer seeking employment as an electrician in January 1997. He did not wear any union insignia on his clothing. Although he observed the sign on the trailer door stating that Respondent was not hiring, he went inside and was able to talk to and present his resume to Howell and discuss his qualifications. Howell returned his resume stating that he better not keep it, but did write down his name and phone number. A few days thereafter, Oxford had a message from Howell on his answering machine requesting the names of his former employer and immediate supervisor. Oxford returned the call and left the information with the secretary. The former employer was a union contractor. Howell contended at the hearing that he was interested in Oxford because he stated he had extensive experience with communications equipment and Respondent was being considered to perform the installation of telephone equipment but that it was not awarded this work and consequently he did not call Oxford's former employer.

Rhodes and union members Perry Ledbetter and Julian Buchanan went to Respondent's job trailer on January 28, 1997. Rhodes wore an IBEW jacket. Ledbetter wore an IBEW T-shirt. Buchanan wore an IBEW hat. The not taking applications sign was on the door. They entered the trailer and Howell told them he was not taking applications. They inquired when he would be taking applications and he replied when he needed more employees. Rhodes asked if Howell would call them when he was hiring and he replied, "[N]o."

Late in January 1997, Jim Ross told his father, Mike Ross, that Howell was seeking experienced employees and Mike Ross telephoned Howell and they discussed his experience. Mike Ross testified that during this conversation Howell told him the Union was attempting to organize Respondent and this was causing problems, as union members were coming to the jobsite and filling out applications. Howell told Ross that Respondent was not union and would not be union. There was a second telephone conversation wherein they discussed the job. Mike Ross inquired whether Howell was still having problems with the Union and how he was getting around them. Howell said there was a not taking applications sign on the door of the trailer and applicants were being sent to Rentenbach's trailer to fill out applications which were then passed on to Little Rock. The applications would be screened and references would be checked. Howell would then call the employees he wished to interview. Howell requested that Mike Ross meet with him on

a weekend so he would not have to take his sign down. Pursuant to Howell's suggestion, Mike Ross and Howell met at a restaurant and discussed the job and salary. Mike Ross testified and Howell conceded that he told Mike Ross that his son, Jim Ross, was a good worker and that he would have loved to make him a foreman but he needed him to talk against the Union when it was organizing. Mike Ross testified that Howell asked him if he had been a union member and that he replied that he had been through the union apprenticeship program, but did not reveal his union status. Mike Ross was hired as a foreman and reported to work the next morning, filled out a Little Rock application, and commenced work. Subsequently, Mike Ross was demoted from his foreman's position after Howell told him he had made a mistake in hiring him following his checking on him.

### C. Analysis

#### 1. The 8(a)(1) violations and animus

Howell's statements to Mike Ross that Respondent "has never been union and it will never be union" conveyed to Mike Ross that it would be futile to choose union representation and Respondent violated Section 8(a)(1) of the Act by this statement issued to employee Mike Ross by Howell. Mike Ross testified that during their second telephone conversation he inquired of Howell how he was "getting around" Respondent's "union problems" and Howell told him that he had a sign on the trailer stating that Little Rock was not taking applications and applicants were sent to Rentenbach's trailer and that Rentenbach would then send the applications to Respondent and Howell would then go through them and decide who he would contact. Howell told Mike Ross he wanted to meet with him on a weekend so he did not have to take the not hiring sign down. I credit Mike Ross' testimony as set out above and find that Howell's statement to Ross that he was manipulating its policy in order to avoid hiring union-affiliated applicants was violative of Section 8(a)(1) of the Act. *Starcom, Inc.*, 323 NLRB 977 (1997).

Mike Ross and Jim Ross each testified to interrogation by Howell during his interview of them for employment. Jim Ross testified that Howell asked him if he had ever been sworn in as a union member. Howell testified that he believed Jim Ross had volunteered that he had been a member of a local union in Cincinnati. I credit Jim Ross in this regard. Mike Ross testified that at the dinner meeting on February 16, 1997, Howell asked him whether he had ever been in a union. Ross testified he told Howell he had gone through the union apprenticeship, but did not otherwise answer the inquiry. I credit his testimony in this regard. I find that Respondent violated Section 8(a)(1) of the Act as Howell's inquiries of Jim and Mike Ross constituted unlawful interrogation and were coercive under the circumstances wherein they were seeking employment with Respondent. *Rossmore House*, 269 NLRB 1176, 1177-1178 fn. 20 (1984); *Godsell Contracting*, 320 NLRB 871, 873 (1996).

Jim and Mike Ross testified that on February 24, following a visit to the jobsite by Maurice and Rhodes, Howell held a morning meeting and told the employees that they were only permitted to talk about the Union during nonworktime whereas prior to this employees were permitted to talk about any topic

such as sports, families, etc. Jim Ross testified that there had been a prior restriction on discussion of wages (which is not alleged as a violation). Subsequently, on March 1, Howell met with both Jim and Mike Ross who were then handbilling on behalf of the Union and told them they could not talk about unions on company time. I credit the testimony of Mike and Jim Ross in this regard, and find that the imposition of the prohibition against talking about unions although other nonwork related topics were permitted was discriminatory and that Respondent violated Section 8(a)(1) of the Act. *Maestro Cafe Associates*, 270 NLRB 106, 109 (1984).

Respondent's animus, as set out above, has been amply demonstrated by the testimony of Jim Ross and his father Mike Ross who testified concerning Manager Howell's admissions that he knew how to take care of "trouble" (a designation for union adherents) and who described how he would turn away union adherents and deny them applications or the right to apply for employment. Further, Rhodes testified to a conversation with Respondent's president, Smith, on February 17, 1997, during which Smith told him, "[T]here is no way we're going to do that job union." I credit Rhodes un rebutted testimony. Maurice testified concerning his attempts to be hired which were rebuffed by Howell. I credit his testimony also.

The 8(a)(3) and (1) violations—the refusal to consider and hire the union applicants

I conclude that although Respondent was actively hiring employees throughout the project, as a result of Respondent's animus against the Union, it precluded the consideration and hire of known or perceived union adherents. The record thus supports a finding that all of the alleged discriminatees were identified as union supporters or perceived to be union supporters and were not permitted to apply for employment and consequently were not hired as a direct result of Respondent's animus toward the Union and its adherents, which animus was a substantial and motivating factor in the refusal to permit them to file applications and its refusal to consider them for hire and to hire them. I find that Respondent has failed to establish by the preponderance of the evidence that it would not have hired these applicants in the absence of their prounion sympathies. I reject as not credible and as pretextual the reasons advanced by Respondent's manager, Howell, and its vice president, Godwin, for not hiring the discriminatees. I thus find that Respondent violated Section 8(a)(3) and (1) of the Act by its refusal to consider and hire the discriminatees. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Manno Electric*, 321 NLRB 278 fn. 12 (1996). For a recent similar factual setting see *M & M Electric Co.*, 323 NLRB 361 (1997). In the instant case all of the elements of a discriminatory refusal to hire have been established, *Big E's Foodland*, 242 NLRB 963, 968 (1979), where the Board stated:

Essentially, the elements of a discriminatory refusal-to-hire case are the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an ani-

mus against it, and refused to hire the applicants because of such animus. [242 NLRB at 968.]

In all Howell hired 73 employees commencing in January and culminating in July 1997, when the project was completed. With the exceptions of Jim and Mike Ross who were perceived as antiunion, the Respondent successfully attained its goal of not hiring any union members or supporters.

I find no merit to Respondent's various contentions that any of the applicants had "disabling conflicts" which justified excluding them from consideration for hiring and hiring because their applications were submitted in a group form, because they were then currently employed, because they were paid union officers, because they intended to organize for the Union if hired. Respondent has not established any business reason for not hiring union officials. It has failed to establish any justification for its hiring policy against hiring applicants who work for another employer, or who plan to organize for a union. Paid union organizers Rhodes, Maurice, Michael Miller, Billy Atkinson, Jerry Loftis, and Kenneth Clodfelter testified they could fulfill their duties as an employee of Respondent while performing their duties for their unions on their own time. This testimony was un rebutted and I credit it. Respondent provided no justification for excluding group applications or precluding the hire of employees who may have another occupation. I find this policy was utilized to preclude consideration of union officials and employees who submit group applications as part of a salting effort. However, the mere fact that employees may intend to organize a work force on behalf of a union does not establish a disabling conflict justifying their exclusion from employment. In this case there is no contention by Respondent that the union members who applied were rude or did anything improper which would have justified their exclusion from hiring consideration. I find that Respondent's hiring policy was discriminatorily motivated and was designed to exclude union members, officials, and sympathizers. The hiring procedure was inherently destructive of employee rights and Respondent has not submitted any legitimate business objective justifying the maintenance of this policy. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967); *Honeywell, Inc.*, 318 NLRB 637 (1995); *Pollock Electric*, Cases 16-CA-18629 and 16-CA-18629-2 (1998). (No exceptions filed and adopted by the Board.)

#### CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

(a) Advising employees that it changed its hiring policy in order to avoid accepting employment applications and/or hiring employees associated with the Union.

(b) Promulgating and maintaining a rule prohibiting employees from discussing the Union while permitting the discussion of other nonwork-related topics during working time.

(c) Advising its employees that it was futile to support the Union.

(d) Interrogating its employees concerning their union activities.

4. Respondent violated Section 8(a)(3) and (1) of the Act by its refusal to consider for hire and hire applicants:

Jamie Brown, Steve Wood, Paul J. Rhodes, Robert E. Simmons, Joshua Rhodes, Ronnie Reece, Danny Vella, Gary M. Maurice, Laval Hammett, Perry Ledbetter, Steve McAuley, Julian Buchanon, Ralph Steadwick Jr., Dewey Buckner, Kenneth Clodfelter, Anthony Verounce, Allan Samuels, Billy Atkinson, Dale Willocks, Allen Craver, James Epps Jr., Jerry Loftis, Charlie Dennis, David Mazzie, Randy Hinson, Matthew Steiner, David Steiner, Patrick McCarthy, John Maricle, James Faulkner, William Carmichael, Henry Crowell, Mike Miller, C. D. Willocks, Douglas Hasty, Joshua Donly, Lawrence Reynolds, Frank Ellis, Robert Waters, Edmond Pearsall, Richard Sluder, John Luther, Robert Willocks Jr., Erickson Reynolds, Grant Hill, Bob Krebs, Richard Watt, William Blanken III, Clarence Russell, Eddie Kee, Charles Garman, Howard Hill Jr., Gregory Davis, Marcus Jamison, John Malan, Charles Phillips, and James Tolley.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in violations of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notice.

It is recommended that Respondent be ordered to offer to the discriminatees substantially equivalent positions to the positions for which they applied at jobsites as close as possible to the Cherokee jobsite. Final determination of job availability and backpay liability may be made in the compliance phase of this proceeding. *Westpac Electric*, 321 NLRB 1322 (1996); *Deans General Contractors*, 285 NLRB 573 (1987). The foregoing discriminatees shall be made whole for all loss of backpay and benefits sustained as a result of the discrimination against them by Respondent with backpay and benefits computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>3</sup>

[Recommended Order omitted from publication.]

#### SUPPLEMENTAL DECISION ON REMAND

LAWRENCE W. CULLEN, Administrative Law Judge. On October 16, 1998, I issued my decision in this case finding that Respondent, Little Rock Electrical Contractors, Inc. (Little Rock Electrical or Respondent) violated Section 8(a)(1) and (3) of the Act by its refusal to consider for hire and to hire 57-named job applicants during a hiring period in which it hired 73 employees. By its Order dated June 12, 2000, the National

Labor Relations Board (the Board) remanded the decision to me for further consideration in light of its decision of May 11, 2000, in *FES*, 331 NLRB 9. On June 26, 2000, I issued a notice and invitation to file briefs to the parties prior to my preparation of a supplemental decision and they were duly filed by the General Counsel and the Respondent. On due consideration of the Board's decision in *FES*, the existing record in this case and the supplemental briefs submitted by the General Counsel and Respondent, I find it unnecessary to reopen the record as the existing record provides sufficient evidence to decide this case under the *FES* framework. I further find that my decision issued on October 16, 1998, meets all of the criteria set forth by the Board in *FES* for the elements of a discriminatory refusal to hire prima facie case.

In *FES* at 12, the Board stated:

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits.

If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discriminatees immediate instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them.

I found that Respondent Little Rock Electrical participated in a "job fair" on December 7, 1996, and accepted applications for electrical work for its upcoming job for a gambling casino on the Cherokee Indian Reservation in Cherokee, North Carolina.

<sup>3</sup> Interest shall be computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

Members of Local Unions 238, 342, and 379 of the International Brotherhood of Electrical Workers submitted applications at the job fair. On January 16, 1997, Union Representative Dusty Rhodes submitted additional applications by mail to both the General Contractor Retenbach Construction and to Respondent at its Arkansas headquarters. Subsequently other union applicants attempted to apply for work at the jobsite. Respondent commenced hiring in January 1997, and hired a total of 73 employees during the duration of the job, 20 of whom were Native Americans who were given preferential hiring consideration pursuant to the general construction agreement. Thus the first prong of the *FES* criteria was met as there were available openings at the time the alleged discrimination occurred, and I found that "Respondent was actively hiring employees throughout the project."

Respondent contends in its supplemental brief that the alleged discrimination was limited to the December 7 job fair at a time when it was not hiring. However, I find that the discrimination was a continuing violation, which continued throughout the hiring period. It also relies on its contractual obligation to the general contractor to extend hiring preferences to Native Americans and contends that there were thus no available job openings at the time of the alleged discrimination. This argument unduly limits the hiring period to the job fair and ignores the fact that only 20 of the 73 employees hired by Respondent were Native Americans. Respondent failed to consider and hire Native American Jamie D. Brown who was a union member and whose application filed at the job fair states that he is an enrolled member of the Eastern Board of Cherokee Indians.

A review of the applications and the unrebutted testimony of several of the applicants demonstrate they had substantial training and/or experience relevant to the generally known requirements of the electrical trade. The Respondent did not submit any evidence to meet its burden to demonstrate that there were any announced specific job criteria, which the union applicants failed to meet or that the applicants were otherwise unqualified for the positions. Nor did it demonstrate that others hired had superior qualifications and that it would not have hired the union applicants in the absence of their union activities. The applications of the applicants hired do not reflect that they were

any more qualified than the Union applicants. Since the union applicants met the generally known requirements for the electrical trade, Respondent did not meet its burden to demonstrate that the union applicants were not qualified for the positions they sought.

Respondent also contends in brief that because no hiring was conducted at the December 7 job fair, it is impossible to determine the qualifications of either the Native American or union applicants. It contends that the applications filed by union applicants were insufficient to make this determination. This argument ignores Respondent's burden to demonstrate that the applicants were not qualified as set out in *FES*.

The third prong in *FES* has also been met by the General Counsel as the antiunion animus of Respondent has been overwhelmingly established by the evidence that the union applicants were rebuffed at every attempt they made to be considered for employment and to be hired by Respondent. Union applicants attended the job fair where they submitted applications. The applications of union members were mailed to Respondent's headquarters. Union applicants attempted to apply at the jobsite, all to no avail. I found in my decision that "Respondent's hiring policy was discriminatorily motivated and was designed to exclude union members, union officials and union sympathizers. The hiring procedure was inherently destructive of employee rights and Respondent has not submitted any legitimate business objective justifying the maintenance of this policy."

Accordingly I find that the prior decision in this case meets the criteria of *FES* and the conclusions of law, remedy, and Order are reaffirmed by me. It is noted that the Board has used the term "instatement" in *FES* in place of the word "reinstatement" as this is a refusal to hire case. In *FES*, the Board also stated at 14: "Where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings."

I reaffirm my prior decision except as noted immediately above.